reme Court, U.S.
FILED

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In The

Supreme Court of the United States

THOMAS M. GIESBERG,

Petitioner,

v.

JANIE COCKRELL,

Respondent.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a timely-filed motion for rehearing of denial of a petition for writ of certiorari on direct review toll the statute of limitations in 28 U.S.C. § 2244(d)(1)(A)?

INTERESTED PARTIES

1. Thomas M. Giesberg, Petitioner.
2. John Cornyn, Attorney General of Texas.

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The Fifth Circuit panel's decision conflicts with relevant decisions of this Court. *R. Simpson & Co. v. Comm'r of Internal Revenue*, 321 U.S. 225 (1944); *Flynn v. United States*, 75 S. Ct. 285, 286 (1955) (Frankfurter, J., on motion to withhold notification of denial of certiorari pending petition for rehearing).

The Fifth Circuit panel's decision conflicts with decisions of other United States courts of appeals on the same important matter (whether denial of a petition for writ of certiorari is definitive until the period for filing a rehearing petition has expired or a timely-filed rehearing petition has been denied): *Blair v. Armontrout*, 994 F.2d 532 (8th Cir. 1993); *Hanover Insurance Co. v. United States*, 880 F.2d 1503 (1st Cir. 1989).

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This Court has granted certiorari review in another case on a question which similarly bears upon this Court's determination of when direct review of state and federal petitioners' judgments becomes "final" for the purposes of retroactivity analysis and AEDPA limitations. *Clay v. United States*, 2002 WL 1961270 (Aug. 26, 2002); *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994); *Griffith v. Kentucky*, 497 U.S. 314, 321 n.6 (1987).

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JURISDICTION

The Fifth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291. This Court has certiorari jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(d)(1)(A)

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

Supreme Court Rule 16.3

Whenever the Court denies a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed. The order of denial will not be suspended pending disposition of a petition

for rehearing except by order of the Court or a Justice.

Supreme Court Rule 44.2

Any petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days after the date of the order of denial . . . but its grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

Supreme Court Rule 44.4

The Clerk will not file consecutive petitions and petitions that are out of time under this Rule.

Former Supreme Court Rule 33
(effective January 2, 1947)

A petition for rehearing may be filed with the clerk, in term time or in vacation, within twenty-five days after judgment is entered, unless the time is shortened or enlarged by order of the court, or of a justice thereof when the court is not in session; and must be printed, briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument, and will not be granted, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

Former Supreme Court Rule 34
(as amended 1939)

Mandates shall issue as of course after the expiration of twenty-five days from the day the judgment is entered, irrespective of the filing of a petition for rehearing, unless the time is shortened or enlarged by order of the court, or of a justice thereof when the court is not in session.

No mandate issues upon the denial of a petition for writ of certiorari. Whenever application for a writ of certiorari to review a decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record.

Supreme Court Rule 25.2
(1954 revision)

No mandate issues upon the denial of a petition for writ of certiorari. Whenever application for a writ of certiorari to review a decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record. Such notification will not be withheld pending disposition of a petition for rehearing except by order of the court or of a justice thereof.

Supreme Court Rule 25.2
(as amended 1970)

Whenever application for a writ of certiorari to review a decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record. The order of denial will not be suspended

pending disposition of a petition for rehearing except by order of the court or of a justice thereof.

Supreme Court Rule 23.3
(as amended 1980)

Whenever a petition for writ of certiorari to review a decision of any court is denied, an order to that effect will be entered and the Clerk forthwith will notify the court below and counsel of record. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice thereof.

STATEMENT OF THE CASE

Ramon Montes, the husband of Petitioner's sister, was stabbed to death in the late afternoon of July 12, 1990. Petitioner was indicted for the murder of Montes on November 11, 1992, and, after he entered a plea of not guilty, was tried in 1995 by a jury in the 339th District Court of Harris County, Texas. The State presented (1) testimony from eyewitnesses identifying Petitioner or someone of similar description as having been seen holding onto Montes near the doorway of Montes' burning apartment, (2) testimony suggesting that Petitioner's whereabouts otherwise could not be accounted for around the time of the offense, and (3) a motive: an allegation that Petitioner had been angry because Montes had recently, severely beaten Petitioner's sister. Petitioner presented affirmative testimony from various witnesses which supported a finding that he was elsewhere on July 12th at the time of the crime's commission. The trial court, however, refused Petitioner's request for a jury instruction on

alibi. On April 28, 1995, the jury found Petitioner guilty of murder and assessed a sentence of sixty-five years in prison.

Petitioner timely appealed to the Court of Appeals for the First District in Houston. The Court of Appeals affirmed his conviction on April 24, 1997. *Giesberg v. State*, 945 S.W.2d 120 (Tex. App. – Houston [1st] 1996, pet. granted). Petitioner sought discretionary review from the Texas Court of Criminal Appeals on the question whether the Court of Appeals erred in holding that the trial court committed no error in refusing Petitioner's request "for a jury instruction on the defensive theory of alibi after the evidence fairly raised the issue." Review was granted. However, on September 30, 1998, the Court of Criminal Appeals affirmed the lower appellate court's decision. *Giesberg v. State*, 984 S.W.2d 245 (Tex. Crim. App. 1998) (abrogating *Arney v. State*, 580 S.W.2d 836, 840 (Tex. Crim. App. 1979)). The Court of Criminal Appeals denied Petitioner's timely motion for rehearing on November 18, 1998, but granted his pro se motion to stay the mandate, and the mandate was stayed until it was released on February 16, 1999.

Petitioner's retained counsel filed a petition for writ of certiorari from the Court of Criminal Appeals, presenting due process questions related to the trial court's denial of an alibi instruction. This Court denied the petition for writ of certiorari on February 22, 1999. *Giesberg v. Texas*, No. 98-1105, 525 U.S. 1147 (1999) (Mem.). Petitioner then timely filed, pro se, a motion for rehearing, which this Court denied on April 19, 1999. *Giesberg v. Texas*, No. 98-1105, 526 U.S. 1082 (1999) (Mem.).

From April 1999 until February 2000, Petitioner prepared, pro se, a state post-conviction petition. In early March 2000, an attorney was retained on Petitioner's behalf to finish preparation and file the petition, which was filed in the trial court on April 14, 2000.

Petitioner filed, pro se, his first federal habeas petition on April 18, 2000 in the United States District Court for the Southern District of Texas. Subsequently, on August 4, 2000, Petitioner filed a Motion for Dismissal Without Prejudice. On August 10, 2000, Respondent filed a motion to dismiss the petition as time-barred under 28 U.S.C. § 2244(d)(1)(A), asserting that the 1-year federal habeas statute of limitations period began to run when this Court denied certiorari and that the limitations period had passed before Petitioner filed his state post-conviction petition. Petitioner replied by filing on October 19, 2000, a "Motion to Grant Dismissal Without Prejudice and to Reject Respondent's Motion to Dismiss as Time Barred with Brief in Support." Petitioner argued that his state conviction was not "final" for the purpose of § 2244(d)(1)(A) until this Court denied his petition for rehearing. Because his state post-conviction petition was filed within a year of that date, he argued that it was timely filed to toll the federal limitations period. On March 22, 2001, the federal district court entered an order granting Respondent's motion to dismiss the petition as time-barred and denying Petitioner's motions to dismiss without prejudice. *Giesberg v. Johnson*, Civ. No. H-00-1358 (S.D. Tex. Mar. 22, 2001) (unpublished order and final judgment). The Court also denied a Certificate of Appealability (COA). *Id.* Petitioner filed a motion to alter or amend the judgment regarding the district court's denial of COA. On April 26, 2001, the Court entered an order denying the motion and reiterating

that the "Petitioner's conviction became final on the date the Supreme Court denied the petition for certiorari and not on the date the petition for rehearing was denied, absent extraordinary intervention by the Supreme Court or one of its Justices." *Giesberg v. Johnson*, Civ. No. H-00-1358 (S.D. Tex. Apr. 26, 2001) (unpublished order) (citing *United States v. Thomas*, 203 F.3d 350, 356 (5th Cir. 2000); *United States v. Willis*, 202 F.3d 1279, 1280-81 (10th Cir. 2000)).

Petitioner timely filed, pro se, notice of appeal from the district court's decision, and sought COA from the Fifth Circuit Court of Appeals on six issues, including whether a rehearing motion on denial of a petition for writ of certiorari tolls the 1-year AEDPA statute of limitations and whether equitable tolling might be appropriate.[1] On July 23, 2001, the Fifth Circuit granted COA, stating:

> The district court relied on our decision in *United States v. Thomas*, 203 F.3d 350, 356 (5th Cir. 2000), wherein we held that federal prisoners' convictions became final, triggering the AEDPA's one-year limitations period, on the date that the

[1] Petitioner argued that the case relied upon by the district court, *United States v. Thomas*, *supra*, which answered a question of first impression in the Fifth Circuit (when a federal conviction was final for the purposes of the AEDPA statute of limitations), was unavailable to him in the prison library until sometime after March 20, 2000, when it was published in a Federal Reporter advance sheet. This, he urged, gave him no time to adjust his appellate schedule to comply with the limitations period. The Fifth Circuit dismissed this argument as "without merit," denying COA on the equitable tolling issue. *Giesberg*, 288 F.3d at 271 n.3 (citing *Felder v. Johnson*, 204 F.3d 168, 171-72 (5th Cir.), *cert. denied*, 531 U.S. 1035 (2000) (finding, inter alia, that one's ignorance of one's legal rights is not grounds for equitable tolling)).

> Supreme Court denied the petitioners' petition for a writ of certiorari. We also rejected the prisoners' argument that the limitations period should be tolled for the twenty-five day period that they could have filed a motion for rehearing. *Id.* The prisoners in that case had not moved for rehearing, however, and we did not expressly hold that such a motion would not toll the AEDPA's limitations period. Therefore, reasonable jurists could debate whether the district court was correct in its procedural ruling. Giesberg's request for COA is granted on the issue whether a motion for rehearing of the Supreme Court's denial of a petition for a writ of certiorari tolls the AEDPA's one-year limitations period.

Giesberg v. Johnson, No. 01-20425 (5th Cir. July 23, 2001) (unpublished order). Petitioner and Respondent briefed the issue granted COA, with Petitioner additionally asking the appellate court to expand COA to include the question of equitable tolling. Petitioner moved to expand the record with documentation supporting his argument on equitable tolling and the appellate court ordered supplementation of the record with a floppy disk on January 7, 2002.

On January 23, 2002, the Texas Court of Criminal Appeals issued an order denying Petitioner's state post-conviction application. On January 24, 2002, Petitioner filed under Civil Number H-02-0264 a new federal petition in the district court, presenting the then fully exhausted claims. Inter alia, he also applied for appointment of counsel and submitted a "Motion to Accept and File New Habeas Petition" in which he argued:

> 1. His new petition would be timely if the appellate court or this Court overturned the district

court's order of dismissal with prejudice, because it was filed within a year of the denial of the petition for rehearing to this Court, not counting the days tolled under 28 U.S.C. § 2244(d)(2), for the period of time that the state habeas petition was pending before the Texas Court of Criminal Appeals;

2. If the dismissal with prejudice were overturned, and a dismissal without prejudice therefore were allowed, the new federal petition, with the claims now exhausted in the state courts, should be treated as a first, not successor, petition under *Slack v. McDaniel*, 529 U.S. 473, 487 (2000) ("A petition filed after a mixed petition has been dismissed under *Rose v. Lundy* before the district court adjudicated any claims is to be treated as 'any other first petition' and is not a second or successive petition.") (construing *Rose v. Lundy*, 455 U.S. 509, 510 (1982));

3. He was actually innocent and, therefore, equitable tolling would be appropriate (citing *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (finding "equitable tolling ... appropriate ... when a prisoner is actually innocent"));

4. Article I, Section 9, Clause 2 (the "Suspension Clause") would be violated if the § 2244(d) limitation prevented review of the petition of a petitioner who was actually innocent (citing *Wyzykowski v. Dept. of Corrections*, 226 F.3d 1213, 1218 (11th Cir. 2000)).

On January 31, 2002, Petitioner filed a "Motion to Supplement the Record and for Appropriate Remedies Following State Exhaustion" in the Fifth Circuit Court of Appeals, requesting that the appellate record be supplemented with copies of the documents newly filed in the

district court. He pointed out that he had brought all his exhausted claims to the federal district court in order to avoid any potential problem with resumption of the running of the federal statute of limitations upon the denial of his state habeas petition by the Texas Court of Criminal Appeals. He also specifically requested that the record be supplemented with materials in the Appendix to his Brief on Appeal in support of equitable tolling. Petitioner's motion was granted as to all requests on April 5, 2002.

On March 18, 2002, the district court entered a final judgment dismissing Petitioner's new federal habeas petition without prejudice, treating it as a successive petition requiring an order of authorization under 28 U.S.C. § 2244(b)(3). Petitioner filed a Rule 59(e) motion in the district court, requesting a stay of its order, citing Rule 62, Federal Rules of Civil Procedure, pending a ruling from the appellate court on the statute of limitations issue, noting that in the Fifth Circuit, a "refiled petition is merely a continuation of [the] first collateral attack, not a 'second or successive' petition" requiring authorization to file. *In re Gassery*, 116 F.3d 1051, 1052 (5th Cir. 1997). The district court denied that motion on April 15, 2002. Petitioner timely filed notice of appeal on May 14, 2002, and has filed an Application for Certificate of Appealability in the Fifth Circuit under cause number 02-20570.

On April 23, 2002, the Fifth Circuit issued its opinion denying relief to Petitioner on the appeal of the initial dismissal. *Giesberg v. Cockrell*, 288 F.3d 268 (5th Cir. 2002). The Court relied upon *United States v. Thomas*, *supra*, which held that a federal conviction becomes final for the purpose of AEDPA's limitations period when this Court denies the petition for writ of certiorari, not at the

expiration of the 25-day period allowed for the filing of a petition for rehearing. The Court dismissed Petitioner's argument that *Thomas* was distinguishable by merely adopting the perspective of that opinion, as though dispositive, that the Rule 16.3 signified "an order denying a petition for writ of certiorari is effective immediately upon issuance, absent extraordinary intervention by the Supreme Court or a Justice of the Supreme Court." *Giesberg*, 288 F.3d at 271 (quoting *Thomas*, 203 F.3d at 355) (citing in accord *United States v. Segers*, 271 F.3d 181, 186 n.4 (4th Cir. 2001); *United States v. Willis*, 202 F.3d 1279, 1281 (10th Cir. 2000)).

Following the grant of an extension of time, Petitioner filed petitions for panel and en banc rehearing on June 5, 2002. After undertaking some requested revision, Petitioner re-filed the en banc petition for rehearing on June 18, 2002. The Fifth Circuit panel denied the petitions for panel and en banc rehearing on July 1, 2002.

Petitioner now timely files this petition for writ of certiorari from the Fifth Circuit's April 23rd decision and denials of rehearing on July 1st. Although Petitioner now seeks review from this Court with counsel retained through the largesse of friends, Petitioner has remained personally indigent throughout his federal writ process and has proceeded pro se in federal court up to this point. He respectfully requests that this Court consider his prior pro se status before the lower courts while giving consideration to his arguments. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) ("A pro se complaint, 'however inartfully pleaded' must be held to 'less stringent standards than formal pleadings drafted by lawyers.'") (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

REASONS FOR GRANTING THE PETITION

The Fifth Circuit panel's decision conflicts with relevant decisions of this Court. *R. Simpson & Co. v. Comm'r of Internal Revenue*, 321 U.S. 225 (1944); *Flynn v. United States*, 75 S. Ct. 285, 286 (1955) (Frankfurter, J., on motion to withhold notification of denial of certiorari pending petition for rehearing).

The Fifth Circuit panel's decision conflicts with decisions of other United States courts of appeals on the same important matter (whether denial of a petition for writ of certiorari is definitive until the period for filing a rehearing petition has expired or a timely-filed rehearing petition has been denied): *Blair v. Armontrout*, 994 F.2d 532 (8th Cir. 1993); *Hanover Insurance Co. v. United States*, 880 F.2d 1503 (1st Cir. 1989).

The Fourth, Fifth, Seventh, and Tenth Circuits have interpreted this Court's Rules, in a manner inconsistent with the First and Eighth Circuits, with the consequence that petitioners are precluded from having their one full and fair opportunity to seek federal habeas review. Interpretation of this Court's Rules should be settled by this Court when such consequences are involved.

This Court has granted certiorari review in another case on a question which similarly bears upon this Court's determination of when direct review of state and federal petitioners' judgments becomes "final" for the purposes of retroactivity analysis and AEDPA limitations. *Clay v. United States*, 2002 WL 1961270 (Aug. 26, 2002); *Caspari v. Bohlen*,

510 U.S. 383, 390 (1994); *Griffith v. Kentucky*, 497 U.S. 314, 321 n.6 (1987).

ARGUMENT

The limitations period in Section 2244(d), as it applies to Petitioner, requires that the federal habeas petition be filed within one year of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). This Court denied Petitioner's petition for writ of certiorari on February 22, 1999 and his petition for rehearing on April 19, 1999. Petitioner filed his federal habeas petition on April 18, 2000. On the basis of these facts, the Fifth Circuit panel upheld the district court's decision finding the federal habeas petition time-barred under the AEDPA statute of limitations. 28 U.S.C. § 2244(d)(1)(A). The finding was based upon the district court's view that direct review of a state conviction or sentence is final when this Court denies the petition for writ of certiorari. If, however, a timely-filed petition for rehearing tolls the limitations period, Petitioner's filing of his federal petition fell within the one-year of the conclusion of direct review and should have been dismissed without prejudice (allowing full exhaustion of state remedies)[2] rather than time barred.

[2] State remedies were pursued and the federal petition was re-filed within the 1-year limitations period, if it was tolled by the period the petition for rehearing was pending before this Court, as well as the time that the post-conviction application was pending in the Texas courts (a matter of no controversy).

A. The Fourth, Fifth, Seventh, and Tenth Circuits have held, in conflict with the relevant decisions of this Court, that a decision by this Court denying certiorari concludes direct review of a petitioner's conviction or sentence, whether or not a petition for rehearing is filed.

Petitioner's Fifth Circuit panel held that the AEDPA statute of limitations is not tolled while a state inmate avails himself of his right to file a petition for rehearing from denial of certiorari on direct review of his conviction or sentence. *Giesberg*, 288 F.3d at 271. Most of the circuit cases that consider the issue as it applies to the limitations period in § 2255 address circumstances wherein rehearing was not sought. *Horton v. United States*, 244 F.3d 546, 550 (7th Cir. 2001); *United States v. Thomas*, 203 F.3d 350 (5th Cir. 2000); *United States v. Willis*, 202 F.3d 1279, 1281 (10th Cir. 2000); *but see United States v. Segers*, 271 F.3d 181, 183, 186 (4th Cir. 2001) (holding conviction final when this Court denies certiorari after a federal prisoner's direct appeal, not when filed petition for rehearing is denied). All of these decisions (including Petitioner's) hold that, with respect to the AEDPA limitations period, direct review is final when this Court issues an order denying a timely filed petition for writ of certiorari. All, therefore, are inconsistent with this Court's longstanding position that certiorari denial is not "final" until a timely-filed motion for rehearing is decided.

Although rehearing is not a matter of right, the right to petition for rehearing within 25 days of denial of the petition for writ of certiorari is a matter of right. *R. Simpson and Co. v. Comm'r of Internal Revenue*, 321 U.S. 225, 229 (1944) ("Our rules provide for petitions for rehearing

as matter of right within 25 days after judgment, and this rule has been applied to petitions for rehearings of orders denying certiorari."). In fact, this Court deems "denials of certiorari as ***qualified*** until the 25-day period expires."[3] *Id.* (emphasis added). As Justice Frankfurter explained:

> A petition for rehearing of a denial of a petition for a writ of certiorari is part of the appellate procedure authorized by the Rules of this Court. . . . The right to such a consideration is not to be deemed an empty formality as though such petitions will as a matter of course be denied. This being so, the denial of a petition for certiorari should not be treated as a definitive determination in this Court, subject to all the consequences of such an interpretation.

Flynn v. United States, 75 S. Ct. 285, 286 (1955) (Frankfurter, J., on motion to withhold notification of denial of certiorari pending petition for rehearing).

When a petitioner exercises his right to seek rehearing, the "practice heretofore observed"[4] by this Court is to deem the decision denying certiorari non-final until the decision on the petition for rehearing. *Simpson*, *supra*. As an illustration of how non-final the decision may be, in *Florida v. Rodriguez* this Court denied certiorari sought by the Florida Attorney General in 1981, yet granted review

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[3] *See* ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO, & KENNETH S. GELLER, SUPREME COURT PRACTICE, Sec. 15.4 (8th ed. 2002) ("[T]he Supreme Court's denial of certiorari is 'qualified' and not final until the expiration of the period in which a petition for rehearing is allowed.").

[4] "Heretofore observed" was this Court's description in 1944. This Court has not revisited the question since *Simpson*.

in 1983 on the timely-filed petition for rehearing. The Attorney General had urged as an intervening circumstance the filing of a certiorari petition in another case and had complained that Florida Supreme Court per curiam decisions were harming prosecutions. *Florida v. Rodriguez*, 469 U.S. 1, 11 (1984). Final disposition of the appeal occurred four years after this Court's denial of certiorari. *State v. Rodriguez*, 462 So. 2d 69 (Fla. App. [3d Dist.] 1985) (order on remand).

B. The First and Eighth Circuits have held, in agreement with this Court, that denial of a petition for writ of certiorari is not final until the time for rehearing has passed or this Court has denied a timely-filed petition for rehearing.

There is no final denial of certiorari until a timely-filed petition for rehearing is denied. Indeed, the First and Eighth Circuits hold that, even when no rehearing petition is filed, certiorari is not finally decided until the 25-day period for filing a rehearing petition passes. *Blair v. Armontrout*, 994 F.2d 532, 533 (8th Cir. 1993) (noting that there is "little law" for guidance on the question, but holding that the decision is final upon expiration of the time for seeking rehearing, upon denial of a timely-filed petition for rehearing, or as this Court should order if a rehearing petition is granted); *Hanover Insurance Co. v. United States*, 880 F.2d 1503 (1st Cir.), *cert. denied*, 493 U.S. 1023 (1989) (holding that tax court decision "became final for purposes of deficiency assessment period when time to file rehearing of denial of certiorari had passed, rather than when Supreme Court denied certiorari"); *Sweet v. C.I.R.*, 120 F.2d 77 (1st Cir. 1941) (holding that

decision of board "became a 'final decision' when the United States Supreme Court denied certiorari to review judgment of Court of Appeals affirming the board's decision or at least upon lapse of the 25 days thereafter during which period, under rules of Supreme Court, the taxpayers might have asked for a rehearing in the Supreme Court.").

C. The Fourth, Fifth, Seventh, and Tenth Circuits have issued decisions conflicting with relevant decisions of this Court and the First and Eighth Circuits by misinterpreting this Court's Rules without concern for the consequences.

Petitioner, filing pro se, argued *Simpson*, *Blair*, and *Hanover* to the courts below, reminding them that, if they were to interpret this Court's denial of certiorari as the final, definitive determination on direct review of his state conviction and sentence, he would be unfairly deprived of his first, and possibly only, opportunity for federal habeas review. The Fifth Circuit ignored Petitioner's entreaties to examine the issue in light of *Simpson* and the other relevant cases. Indeed, *all of the recent circuit court decisions* examining the same issue have ignored *Simpson* and the other relevant cases. They all have tied their wagons to a dubious interpretation of Supreme Court Rule 16.3, citing each other in a closed circle of interpretation. *E.g.*, *Giesberg*, 288 F.3d at 271 (citing *Segers*, *Willis*, and *Thomas*); *Segers*, 271 F.3d at 185 (citing *Willis*, *Thomas*, and *Horton*); *Horton*, 244 F.3d at 550 (citing *Thomas*, *Willis*). *Willis*, the first in line of these cases, purports to rely on Stern and Gressman, having "found no case law interpreting Rule 16.3." *Willis*, 202 F.3d at 1281 (citing ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 6.43).

If the Tenth Circuit panel in *Willis* had recalled that this Court's Rules have evolved and changed in number over time, it would have found the First Circuit's decision in *Hanover* and a fairly extensive critique therein of the position the Tenth Circuit took regarding Rule 16.3. *Hanover*, 880 F.2d at 1508 & 1508 n.5 (referring essentially to the position taken by the Fourth, Fifth, Seventh, and Tenth Circuits as "sorely misdirected"). Rule 23.3 of the 1980 edition of this Court's Rules, the lineal precursor to Rule 16.3, stated like the current version that, "The order of denial [of a timely-filed petition for writ of certiorari] will not be suspended pending disposition of a petition for rehearing. . . . " *Hanover*, 880 F.2d at 1508 n.5. The appellant in *Hanover* apparently argued that this language had substantive effect on the question when the decision below became final. The First Circuit concluded just the opposite, that the "carefully chosen language" of the Rule, supported by this Court's decision in *Simpson*,[5] indicates that the order denying certiorari is effective but qualified. *Id.* at 1508. "[I]n order to preserve the integrity of [this] Court's rehearing rules," the order denying certiorari is "subject to vacation." *Id.* The Rule manifests that the order of denial is "limited; restricted . . . or temporary" but not "interrupt[ed] . . . postpone[d] . . . or stay[ed]," without the intervention of a Justice. *Id.* (quoting BLACK'S LAW DICTIONARY 1117, 1297 (5th ed. 1979) (defining "qualified" and "suspended"). The First Circuit would instruct the Tenth Circuit that there is a critical legal

[5] The First Circuit notes that "finality" was this Court's "key concern" in *Simpson*. *Hanover*, 880 F.2d at 1507 (citing *Simpson*, 321 U.S. at 230 (Douglas, J., dissenting).

distinction between effectiveness and finality of a decision. Interpreting the post-1970 version of the rule as a strictly notification provision, the First Circuit found nothing in it that reflects finality. *Hanover*, 880 F.2d at 1508 ("We find ourselves at a loss to understand how notification anent a decision can be construed to affect the decision's finality.") (citing *Flynn*, 75 S. Ct. at 286) ("although denial of certiorari not definitive until rehearing period elapses, 'there is no reason for withholding notification of the denial of a petition for certiorari for the full duration afforded for the filing of a petition for rehearing' ")).

The history of Rule 16.3 indeed demonstrates that it is nothing more than a notice provision. JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 516App.100 (3d ed. 2002). Rule 16 is the descendent of Supreme Court Rule 40, which was created at the time of the great expansion of this Court's certiorari jurisdiction in the Judiciary Act of 1925. Rule 40 ordered that notice of the *granting* of a petition for certiorari be given to the court below and to counsel of record. *Id.* In 1939, Supreme Court Rule 34, which dealt with mandates of this Court, was amended to provide for notice to the court below and counsel of record of the *denial* of a petition for writ of certiorari. *Id.* This Court interpreted the 1939 versions of Rules 33 (rehearing) and 34 in *Simpson* when it found denials of certiorari not final, but "qualified until the 25-day period expires." *Simpson*, 321 U.S. at 229-30. In 1954, Rules 34 and 40 (then 43) were combined in former Rule 25. The last sentence of Rule 25.2 commented on the notification to the court below and counsel of record to the effect that "[s]uch notification will not be withheld pending disposition of a petition for rehearing except by order of the court or of a justice thereof." In 1970, Rule 25 was amended to read in

that same significant part: "The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the court or of a justice thereof." The amendment clarifies that the practice of not withholding notice of denial means that *the order is issued and distributed to the court below and the parties*. This version of the final sentence of the rule survives to the present, forming the basis for the Fourth, Fifth, Seventh, and Tenth Circuits' unstudied opinions that a rule housekeeping change about notice to courts and litigants below affects the finality of judgments under this Court's review.

The Tenth Circuit mistakenly asserts that Stern & Gressman's interpretation of the last sentence in Rule 16.3 "is in accord with [its] interpretation." *Willis*, 202 F.3d at 1281. Stern interprets the sentence to mean that "the order of denial is legally effective as of the time of its entry by the Supreme Court and that the lower courts may take further appropriate action in light of the denial as they see fit." Stern et al., *supra*, at § 6.43. This does not mean that the direct review is final as the Tenth Circuit concludes. The same treatise tells us that this Court holds that "denial of certiorari is 'qualified' and ***not final*** until the expiration of the period in which a petition for rehearing is allowed." *Id.* at § 15.4 (emphasis added).[6] Given the scarce chance of rehearing, it is reasonable that the order of denial be described as allowing the lower courts to take action "as they see fit." It is also reasonable that the litigants be put on notice that, depending upon the circumstances

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[6] Petitioner's copy is ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO, AND KENNETH S. GELLER, SUPREME COURT PRACTICE (8th ed. 2002).

below, they may want to act to suspend the order. The irony is that, as Stern & Gressman point out, even "[a]n order ***granting certiorari*** is not generally regarded as automatically staying the judgment below if a stay order has not been previously obtained." *Id.* at § 6.42. The treatise warns that the "only safe course is to request a stay under Rule 23 if one is needed." *Id.* (citing *Arkansas Term Limits v. Donovan*, 519 U.S. 958 (1996) (granting stay of state supreme court mandate pending timely filing and disposition of petition for certiorari). Indeed, without a stay order being issued by this Court, state courts below are free to release their own mandate according to their own timetables, even when that allows such stark consequences as the retrial of the defendant while certiorari is pending. *Fearance v. State*, 771 S.W.2d 486, 495 (Tex. Crim. App. 1988), *cert. denied*, 492 U.S. 927 (1989) (rejecting contention on appeal from retrial that trial court had no jurisdiction while Supreme Court was considering whether to grant certiorari on double jeopardy issue).[7]

[7] On October 26, 1998, Petitioner indeed filed a pro se motion to stay the Court of Criminal Appeals' mandate on direct review pending this Court's disposition of his petition for writ of certiorari, and pursuant to Rule 18.2, Texas Rules of Appellate Procedure. On November 18, 1998, the Court granted the motion, staying the mandate until February 16, 1999.

D. The Fourth, Fifth, Seventh, and Tenth Circuits have failed to appreciate that Rule 44 (not Rule 16.3) very adequately protects this Court's and the lower courts' legitimate needs for finality of their decisions and judgments.

The history of the rules reflects that Supreme Court Rule 44, not Rule 16.3, protects this Court's own interests in the finality of its decisions and modifies the finality of judgments below. 23 MOORE'S FEDERAL PRACTICE sec. 544 App.100-4 (3d ed. 2002); STERN ET AL. at 15.1, page 716. Moore succinctly asserts: "[A] petition for rehearing undermines the finality of the Court's judgments, not a desirable policy unless the time to petition for rehearing is reasonably short, is not an accordion-like time period, and the number of consecutive petitions is held to a minimum." Moore, *supra*, at 544App.-4. Changes made to the rules in 1947, culminating in the current Rule 44, were designed to fairly enhance finality. STERN & GRESSMAN (2002) at § 15.1, pp. 716, 730. Rule 44 provides a strict time frame for petitioning for rehearing that is very much like a statute of limitations as to structure and purpose. It balances this Court's and the lower courts' interests in finality of litigation with a petitioner's need for access to the courts to determine the fairness of his conviction and sentence.[8] *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957).

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[8] Rehearing most often has been granted to allow new and favorable "intervening" decisions or legislation to be applied to the petitioner's case. *See, e.g.*, *Fuentes v. United States*, 517 U.S. 1022 (1995) (granting petition for rehearing, vacating order entered on May 30, 1995, denying certiorari, granting certiorari, and remanding for

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Supreme Court Rule 44 does not allow a state or federal inmate to manipulate the system to create more time to file a federal habeas petition. Rule 44.2's strict twenty-five day window for petitioning for rehearing, combined with Rule 44.4's general bar on out-of-time petitions, blocks dilatory behavior. With these protections of finality in place, it is unreasonable to treat Rule 16.3 as an additional finality provision, especially given the potential consequences for litigants. *Flynn*, 75 S. Ct. at 286; *Blair*, 994 F.2d at 532 (motion to vacate stay of execution); *Giesberg et al.*, *supra* (denial of review on first and likely only possible federal petition for habeas corpus); *Hanover*, 880 F.2d at 1509 ("If a decision become[s] final upon denial, but the period for rehearing remains operative, when does the statute of limitations begin its march if rehearing is granted?").

E. The Fourth, Fifth, Seventh, and Tenth Circuits have misinterpreted "the conclusion of direct review" in 28 U.S.C. § 2244(d)(1)(A) by excluding petitions for rehearing and, thereby, depriving state inmates of one full and fair round of federal habeas review, contrary to the more generous intent of Congress.

Congress took care to qualify every one of its potential statutory "triggers" of the limitations period with the phrase, "[t]he limitations period shall run from the *latest* of. . . . " 28 U.S.C. § 2244(d)(1)(A). In Petitioner's case, the

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consideration in light of another opinion issued by this Court on December 6, 1995).

limitations period runs from "the date on which the judgment became final by the conclusion of direct review." *Id.* Review of a state criminal conviction or sentence by this Court, following direct appeal, is direct review of the conviction. *Bell v. Maryland*, 378 U.S. 226, 232 (1964). Given Congress' generosity and aim to toll from the "latest" date, the decision of the Fourth, Fifth, Seventh, and Tenth Circuits to exclude from within "direct review" the *short* period wherein a petitioner, **by right**, may seek rehearing conflicts with Section 2244(d).

The circuit courts have reasonably found that the drafters of 28 U.S.C. § 2244(d)(1)(A) looked to this Court's retroactivity decisions to define the parameters of the AEDPA statute of limitations. *Anderson v. Litscher*, 281 F.3d 672, 675 (7th Cir. 2002) (quoting *Teague*, *supra*, 489 U.S. at 295); *Locke v. Saffle*, 237 F.3d 1269, 1272-73 (10th Cir. 2001); *Williams v. Artuz*, 237 F.3d 147, 151 (2d Cir. 2001); *Bowen v. Roe*, 188 F.3d 1157, 1158-60 (9th Cir. 1999). The Eighth Circuit has explained the circuit courts' logic:

> When Congress elects to use terminology that has become commonplace in court decisions in a particular field of law, the rules of statutory construction call for us to define the statute's terms in harmony with that accepted judicial meaning.

Smith v. Bowersox, 159 F.3d 345, 347-48 (8th Cir. 1998) (citing *Evans v. United States,* 504 U.S. 255, 259-60 (1992) citing and quoting *Morissette v. United States,* 342 U.S. 246, 263 (1952)); *see also Derman v. United States*, 298 F.3d 34 (1st Cir. 2002) (citing *Griffith* and *Hanover* as sources for the "well-defined meaning in federal law" of "final" when interpreting the AEDPA).

By the time the AEDPA was being drafted, this Court had clarified that a state conviction and sentence would be deemed "final for the purposes of retroactivity analysis when the availability of direct appeal to the state courts ha[d] been exhausted and the time for filing a petition for a writ of certiorari ha[d] elapsed or a timely filed petition ha[d] been finally denied." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) (citing and paraphrasing *Griffith v. Kentucky*, 497 U.S. 314, 321 n.6 (1987)); *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997) ("Lambrix's conviction became final on November 24, 1986, when his time for filing a petition for certiorari expired."); *see Teague v. Lane*, 489 U.S. 288, 295 (1989) (quoting *Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986) (quoting *Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965)) (same).

If for retroactivity purposes, a certiorari denial always terminated direct review, this Court would have had no use for the qualifier "finally" in *Caspari* and *Griffith*. At the very least, "finally" takes into account the reality that sometimes direct review is not over until this Court has decided upon a timely-filed rehearing petition. *Simpson*, 321 U.S. at 228-30 (quoting United States Senate committee on the "utmost importance" of specifying times for finality as accurately as possible and observing that this Court's Rules suspend the finality of denials of certiorari until the 25-day period for filing a rehearing petition passes). This Court repeatedly has vacated denials of certiorari based on decisions rendered or laws enacted during, or shortly after, the time certiorari was pending. *See Friend v. United* States, 517 U.S. 1152 (1996); *Fuentes v. United States*, 516 U.S. 1022 (1995); *Zap v. United States*, 330 U.S. 800 (1947) [based upon new, controlling decision by this Court]; *Sioux Tribe v. United States*, 329

U.S. 684, 685 (1946); *Massey v. United States*, 291 U.S. 608 (1934) [based upon new legislation]. Indeed, the main reason cited for rehearing by Rule 44.2 is "intervening circumstances of a substantial or controlling effect."

Congress notably did not define the point at which the limitations period would begin to run as "the date on which the judgment became final by the denial of the petition for writ of certiorari." *See* 28 U.S.C. § 2244(d)(1)(A). Certainly, the phrase "conclusion of direct review" would include cases in which the writ was *granted*. However, in the light of this Court's decisions in *Simpson* and *Flynn* and this Court's practice of granting rehearing petitions to retroactively apply intervening legal events, Congress would have understood the "date on which the judgment became final" to include the period during which a timely-filed petition for rehearing is pending.[9]

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[9] Exclusion of the period during which a timely-filed petition for rehearing is pending also would be inconsistent with this Court's holdings that such a petition in the lower court – or any other pleading (no matter what it is named) that seeks to alter the rights adjudicated – "operates to suspend the finality of [the lower court's] judgment" and thereby toll the respective limitations period for seeking review from this Court, as set forth in 28 U.S.C. § 2101. *E.g., Federal Communications Comm'n v. League of Women Voters of California*, 468 U.S. 364, 373 n.10 (1984) (quoting *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 445-46 (1974) (applying the limitations period in § 2101(b)) (holding that the filing of a petition for rehearing or a motion to amend or alter the judgment "suspend[s] the finality of the [original] judgment,'" thereby extending the time for filing a notice of appeal "until [the lower court's] denial of the motion . . . restores" that finality); *Missouri v. Jenkins*, 495 U.S. 33, 45-46 (1990) (applying the limitations period in § 2001(c)) ("Since *Dep't of Banking of Nebraska v. Pink*, 317 U.S. 264 . . . (1942), it has been the consistent practice of the Court to

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This Court has "consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of [its] rules." *Ohio Power*, 353 U.S. at 99. Much more so, the interest in finality must yield to an ***erroneous*** interpretation of the Rules. In Petitioner's case and those similarly situated, the Fourth, Fifth, Seventh, and Tenth Circuits have applied the Rules in a manner contrary to this Court's precedents. Certiorari should be granted so as to correct this, mend the inconsistency with this Court's decisions and the circuit split, and effectuate the overall intent of Congress, when passing the AEDPA, to provide state petitioners one full and fair opportunity to seek federal habeas relief.

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treat petitions for rehearing timely presented to the Courts of Appeals as tolling the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing."). This Court articulated its rationale for tolling the statutory certiorari limitations period during the pendency of a timely-filed petition for rehearing in *Pink*: "A timely petition for rehearing . . . operates to suspend the finality of the . . . court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." *Pink*, 317 U.S. at 266. In *Jenkins*, this Court concluded, "To put the matter another way, while the petition for rehearing is pending, there is no 'judgment' to be reviewed." *Jenkins*, 495 U.S. at 46.

F. The question posed by Petitioner's case – whether a timely-filed petition for rehearing tolls the limitations period in 28 U.S.C. § 2244(d)(1)(A) – is relevant to another question recently granted certiorari by this Court in *Clay v. United States*, 2002 WL 1961270.

This Court granted certiorari review in *Clay v. United States*, No. 01-1500, on August 26, 2002, in order to address the question "[w]hether petitioner's judgment of conviction became 'final' within the meaning of 28 U.S.C. § 2255, para. 6(1), when the court of appeals issued its mandate on direct appeal or when his time for filing a petition for a writ of certiorari expired." The questions in *Clay* and in Petitioner's case both "cast a shadow" on this Court's definition of "finality" in *Caspari* and *Griffith*, *supra*, and, if the retroactivity and AEDPA limitations cases continue to take a parallel course, answers to these questions will affect not only when petitioners may be allowed to present petitions, but also when inmates may or may not be freed as the result of any new rule of criminal procedure. *See Derman v. United States*, 298 F.3d 34, 40-41 (1st Cir. 2002) (interpreting AEDPA and citing, inter alia, *Hanover Ins. Co. v. United States*, 880 F.2d 1503, 1509 (1st Cir. 1989)). This Court's task in *Clay* will be to discern, in light of *Caspari* and *Griffith*, whether the AEDPA limitations period begins to run for federal prisoners (as it does for state prisoners) when "the time for filing a petition for writ of certiorari has elapsed." This inevitably will require the Court to interpret the relationship between its definition of finality for retroactivity purposes – in *Caspari* and *Griffith* – and 28 U.S.C. § 2244(d)(1)(A). The question posed by Petitioner covers the rest of this Court's definition in *Caspari* and *Griffith*: in short, what is

the meaning of when "a timely-filed petition [for writ of certiorari] has been finally denied"? What is the significance of "finally"? Upon granting certiorari review in Petitioner's case, as well as in *Clay*, this Court would be in a position to answer all of the relevant questions about finality of federal and state convictions in relation to the AEDPA limitations periods.

CONCLUSION

Petitioner Giesberg respectfully requests that this Court grant his petition for writ of certiorari, vacate the decision of the Fifth Circuit panel below, and remand his case to the federal district court, with instructions to reverse the order dismissing with prejudice his initial federal habeas petition, Civ. No. H-00-1358, reverse the order dismissing without prejudice his post-exhaustion petition, Civ. No. H-02-0264, and to reinstate Civ. No. H-02-0264 on the docket as timely-filed.

Respectfully submitted,

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APPENDIX A

288 F.3d 268

United States Court of Appeals,
Fifth Circuit.

Thomas M. GIESBERG, Petitioner-Appellant,

v.

Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division, Respondent-Appellee.

No. 01-20425.

April 23, 2002.

Thomas M. Giesberg, Rosharon, TX, pro se.

Patricia K. Dyer, Austin, TX, for Respondent-Appellee.

Appeals from the United States District Court for the Southern District of Texas.

Before JOLLY, JONES and BARKSDALE, Circuit Judges.

PER CURIAM:

Thomas M. Giesberg, a Texas inmate convicted of murder, appeals the district court's order dismissing his application for habeas corpus relief. The district court determined that Giesberg's habeas petition was time-barred by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This court granted Giesberg a Certificate of Appealability ("COA") to determine whether Giesberg's petition for rehearing of the denial of certiorari filed with the Supreme Court tolled AEDPA's one-year limitations period. We hold that Giesberg's petition for

rehearing of the denial of certiorari did not toll the limitations period, and AFFIRM the order of the district court.

BACKGROUND

On April 28, 1995, a Texas jury found Giesberg guilty of murder. Giesberg was sentenced to sixty-five years in prison. Giesberg's conviction was affirmed on direct appeal by the First Court of Appeals of Texas. *Giesberg v. State,* 945 S.W.2d 120 (Tex.App. – Houston [1st Dist.], pet. granted). The Texas Court of Criminal Appeals affirmed Giesberg's conviction on September 30, 1998. *Giesberg v. State,* 984 S.W.2d 245 (Tex.Crim.App.1998). Giesberg's petition for a writ of certiorari was denied by the Supreme Court on February 22, 1999. *Giesberg v. Texas,* 525 U.S. 1147, 119 S.Ct. 1044, 143 L.Ed.2d 51 (1999). Giesberg filed a timely petition for rehearing of the denial of certiorari. This petition for rehearing was denied by the Supreme Court on April 19, 1999. *Giesberg v. Texas,* 526 U.S. 1082, 119 S.Ct. 1490, 143 L.Ed.2d 571.

On April 18, 2000, Giesberg filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Texas. The State of Texas moved to dismiss Giesberg's petition as time-barred by AEDPA, 28 U.S.C. § 2244(d)(1)(A). The district court, relying on this court's decision in *United States v. Thomas,* 203 F.3d 350 (5th Cir.2000), determined that Giesberg's state conviction was rendered final on the date the Supreme Court denied certiorari. Accordingly, the district court dismissed Giesberg's petition because it was filed more than one year after his conviction was final. *See* 28 U.S.C. § 2244(d). The district court denied Giesberg's request for a COA.

This court granted Giesberg a COA to determine whether AEDPA's one-year limitations period was tolled by the petition for rehearing of the denial of certiorari timely filed by Giesberg in the Supreme Court.[1]

DISCUSSION

An order dismissing a habeas application as time-barred by AEDPA is subject to *de novo* review. *Johnson v. Cain,* 215 F.3d 489, 494 (5th Cir.2000). Giesberg's habeas petition, governed by the provisions of AEDPA, had to be filed within one year of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Giesberg argues that his conviction was not final until the Supreme Court denied his petition for rehearing of the denial of certiorari. The State of Texas argues that Giesberg's conviction was final on the date the Supreme Court denied Giesberg's petition for writ of certiorari.

This court has held that a federal conviction becomes final for purposes of AEDPA's one-year limitation period when the Supreme Court denies the petition for writ of certiorari. *United States v. Thomas,* 203 F.3d 350, 356 (5th

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[1] A COA should be granted on a procedural issue under AEDPA when the petitioner shows, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484-85, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Both parts of this test must be fulfilled before a COA should be issued.

Cir.2000). The petitioners in *Thomas* argued that their convictions were not final until the expiration of the twenty-five-day period for filing a petition for rehearing of the denial of certiorari. This court rejected this argument because "[t]he plain text of Supreme Court Rule 16.3 provides that an order denying certiorari review takes legal effect and is not suspended pending any application for rehearing." *Id.*

Giesberg seeks to distinguish *Thomas* for two reasons. First, he argues that *Thomas* only addressed the provisions of § 2255 applicable to federal prisoners seeking habeas relief, whereas he is a state prisoner. Second, Giesberg contends that, unlike the circumstances of this case, the petitioners in *Thomas* had not actually filed a petition for reconsideration for denial of certiorari.

Giesberg's first argument is without merit. The one-year limitation provision applicable to a federal prisoner's § 2255 motion for relief is "virtually identical" to the provision applicable to a state prisoner's § 2254 motion. *Flanagan v. Johnson,* 154 F.3d 196, 200 n. 2 (5th Cir.1998) (citing *United States v. Flores,* 135 F.3d 1000, 1002 n.7 (5th Cir.1998)). Despite a minor difference in the statutory language that determines when the limitation period begins to run for § 2254 and § 2255 motions,[2] the key to

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[2] Section 2244(d)(1)(A), the limitation period applicable to a state prisoner's motion for habeas relief, provides that the limitation period begins running on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Section 2255(1), applicable to a federal prisoner's motion for habeas relief, provides that the limitations period begins running on "the date on which the judgment of conviction becomes final."

both provisions is the finality of the underlying judgment. Although *Thomas* addressed only the provisions of § 2255(1), its reasoning regarding the finality of a denial of certiorari is applicable to Giesberg's state conviction.

Giesberg next contends that *Thomas* is distinguishable because the petitioners in *Thomas* had not filed petitions for rehearing of the denial of certiorari. While this is correct, nevertheless, *Thomas*'s reasoning appears dispositive against Giesberg. *Thomas* rested its holding on Supreme Court Rule 16.3, which states:

> Whenever the Court denies a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed. *The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice.*

Sup.Ct. R. 16.3 (emphasis added). The court reasoned that Rule 16.3 makes clear that "an order denying a petition for writ of certiorari is effective immediately upon issuance, absent extraordinary intervention by the Supreme Court or a Justice of the Supreme Court." *Thomas,* 203 F.3d at 355. In the present case, no member of the Supreme Court suspended the denial of Giesberg's petition for certiorari; Giesberg's conviction accordingly was final on the date certiorari was denied.

This conclusion accords with the decisions of other circuits. *See United States v. Segers,* 271 F.3d 181, 186 n. 4 (4th Cir.2001) (explaining that filing of petition for rehearing of denial of certiorari does not affect finality of denial of certiorari for purposes of AEDPA's one-year limitation

period); *United States v. Willis,* 202 F.3d 1279, 1281 (10th Cir.2000) ("After the Supreme Court has denied a petition for writ of certiorari, neither the filing of a petition for rehearing from the denial of certiorari, nor the expiration of the time in which such a petition could be filed delays the commencement of the one-year limitation period.").[3]

CONCLUSION

For the foregoing reasons, Giesberg's conviction was final, for purposes of AEDPA's one-year limitations period, when his petition for certiorari was denied by the Supreme Court. His motion for habeas corpus relief was time-barred by § 2244(d)(1)(A). The judgment dismissing the habeas petition is therefore AFFIRMED.

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[3] Giesberg also asserts equitable tolling based on his delayed receipt of information inside the prison about the *Thomas* decision, *supra.* This contention lacks merit. *Felder v. Johnson,* 204 F.3d 168, 171-72 (5th Cir.), *cert. denied,* 531 U.S. 1035, 121 S.Ct. 622, 148 L.Ed.2d 532 (2000).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20425

THOMAS M GIESBERG

Petitioner-Appellant

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

Respondent-Appellee

Appeals from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion 04/23/02, 5 Cir., ___, ___ F.3d ___)

(Filed Jul. 01, 2002)

Before JOLLY, JONES, and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge